IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs April 29, 2009

PAUL WILLIAM WARE v. STATE OF TENNESSEE

Appeal from the Criminal Court for Hamilton County
No. 234768 Don W. Poole, Judge

No. E2008-02393-CCA-R3-PC - Filed December 2, 2009

The petitioner, Paul William Ware, appeals from the Hamilton County Criminal Court's denial of post-conviction relief from his convictions for first degree murder and two counts of rape of a child. On appeal, the petitioner argues that he received the ineffective assistance of counsel at trial in that trial counsel failed to: (1) call a defense expert who would have "opined that the FBI protocols for mitochondrial DNA were not adequate to justify admission of said evidence into the record"; (2) request DNA testing of a hair found on the victim's body; and (3) call an investigator who would have testified regarding a conversation between the emergency room doctor who treated the victim and the petitioner's attorney. We affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

W. Gerald Tidwell, Jr., Chattanooga, Tennessee, for the appellant, Paul William Ware.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; William H. Cox, III, District Attorney General; and Neal Pinkston, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The record reflects that the petitioner was indicted for felony murder and multiple counts of rape of a child following the October 1994 death of the four-year-old victim. After several continuances, in September 1996 a Hamilton County jury found the petitioner guilty of first degree murder and two counts of rape of a child. The State sought the death penalty, but the jury instead imposed a sentence of life without parole. The trial court imposed sentences of twenty-five years for each child rape conviction; the court ordered that these sentences be served concurrently with each other but consecutively to the petitioner's life sentence. This court affirmed the petitioner's convictions and sentences on appeal. State v. Paul William Ware, No. 03C01-9705-CR-00164, 1999

WL 233592 (Tenn. Crim. App., Knoxville, Apr. 20, 1999), perm. app. denied, (Tenn. Nov. 22, 1999).

The petitioner subsequently filed a timely pro se petition for post-conviction relief. The post-conviction court appointed counsel, who filed an amended petition in April 2002. In September 2007, the post-conviction court issued an order dismissing seven of the petitioner's eight claims as either previously determined, waived, or not cognizable for post-conviction relief. The petitioner's ineffective assistance of counsel claim was the only remaining allegation. The post-conviction court held an evidentiary hearing on February 4, 2008.

As summarized by this court on direct appeal, on the evening of September 30, 1994, the victim and her mother lived at Sheila King's residence in Chattanooga, along with King's two children. Paul William Ware, 1999 WL 233592, at *1. That night, several persons, including the petitioner and the victim's mother, were out drinking at various Chattanooga bars while King stayed at home with her children and the victim. Id. at *1. Between 9:30 and 10:00 p.m., Paul Crum arrived at the home with an acquaintance, looking for the petitioner. Id. at *2. Crum went out and found the petitioner before returning home to babysit the children. Id. at *3. King left the house at 10:45 p.m., looking for the victim's mother. Id. at *2. While she was out, King encountered the petitioner, who appeared intoxicated. Id. King invited the petitioner, who formerly lived at King's house, to stay at the house that night. Id. After King left, Crum was the only person in the house with the children. Id. at *3.

Crum testified that the petitioner returned to the house "at approximately 1:30 or 2:00" the morning of October 1. Id. "Crum stated that he put the children to bed when the [petitioner] arrived and that he placed the sleeping victim, who was clothed and wrapped in a comforter, on one of the two twin beds in the bedroom where she normally slept with her mother." Id. The petitioner, who Crum said was "[d]runk . . . [w]obbling, slurring when he was talking . . . [a]nd real sick, pale looking," then "went into the kitchen, made a sandwich, ate it, 'threw up,' made a phone call, and then went into the bathroom." Id. (footnote omitted). Crum was watching a movie when the petitioner emerged from the bathroom and went into the bedroom where the victim was sleeping. Id. Crum assumed that the petitioner "'went in there to pass out' on the other twin bed, which was empty." Id.

According to Crum, the victim's mother and her boyfriend arrived at the house between forty-five minutes and an hour after the petitioner went into the victim's bedroom. Id. The victim's mother testified that she had left a local restaurant around 2:30 a.m. and drove toward the house. Id. at *1. Fifteen to twenty minutes after arriving, the victim's mother asked about her daughter; Crum told her that the girl and the petitioner were sleeping in the same bedroom. Id. at *3. The victim's mother found the door locked, requiring her and Crum to unlock the door with a knife. Id. at *4.

> Once inside the room, Dye [the victim's mother] and Crum noticed that neither the [petitioner] nor the victim were in the beds. On the bed where the victim had slept, there was what appeared to be a wet urine stain, and the bedclothes were in disarray. Dye testified that Crum looked under the bedclothes for the victim, and

> when "[h]e shook the covers . . . , [the victim's] clothing . . . fell out into the floor . . . . [I]t was her top and shorts and her panties was [sic] still in the shorts." In addition, beige men's pants containing the [petitioner]'s wallet were later found between a twin bed and the dresser, which sat between the two twin beds in Dye's room, and a pair of red men's underwear, which apparently was not noticed initially, was later found at the foot of the bed where the victim had slept. The owner of the underwear was never identified.

Id. (footnotes omitted).

The victim's mother then went to a nearby utility room, where she found the victim and the petitioner lying on the floor, both nude. Id. at *4. The victim's mother "said that the victim 'was purple,' her 'mouth was already blue,' and her body was cool or cold to the touch. [The mother] kicked the [petitioner] several times, but he did not respond or move." Id. The victim's mother brought the girl to a hospital, where she was pronounced dead at 3:24 a.m. Id.

Evidentiary Hearing Testimony

Trial counsel testified that as of the evidentiary hearing, he had been licensed for thirty-one years and had focused his career on criminal defense cases. He said that as of petitioner's trial, he had tried between seventy-five and one hundred cases in front of a jury, including at least fifty homicide cases, and he was certified to serve as lead counsel in death penalty cases. He testified that an attorney from the public defender's office served as co-counsel. Counsel also retained the services of two investigators from the public defender's office, Allen Miller and Randy Milsaps; a private investigator, Bill DePillo; a jury consultant, David Ross; a DNA expert, Dr. William Shields; and a forensic pathologist, Dr. Cleland Blake. Of note, Dr. Shields did not testify at the evidentiary hearing.

The record reflects that one of the main issues in this case concerned the State's use of mitochondrial DNA (mtDNA) testing on the hairs found on the victim's body. Counsel acknowledged that the petitioner's trial was "the very first case" in which mtDNA testing was used. He said that "fairly shortly after [he] got involved in it [he] realized there was going to be some analysis of hair;" red hairs were found in the victim's larynx and on her lip, and a brown hair was found in the child's rectum and anus. He was aware that the petitioner "was probably the only red-haired person who spent significant time at that house, and that he had slept in . . . the laundry room, where the child was first found, and . . . the bed where the child sleeps."

Counsel testified that "early on" during the case, he retained the services of Dr. Shields, who had been recommended to him by members of O.J. Simpson's criminal defense team. Counsel explained that Dr. Shields, an ornithologist by trade, was an expert "in the scientific method. . . . [W]hat we were looking for in this case . . . since [mtDNA] was a brand new field, was somebody [who] could evaluate the FBI's test and their performance and tell us how good the science was." Dr. Shields and the defense team found that "all of the peer review papers that would make this sort of science more than junk science were reviewed in one journal, and that one journal was kept in four libraries in the entire world," all of which were libraries of law enforcement agencies. Two of

these libraries were FBI libraries; one was the Interpol library, and the other was the Scotland Yard library. Furthermore, counsel noted that the case "kept getting continued for the FBI lab, in theory, to put together . . . their protocol, and then to actually try to test the hairs."

The record reflects that the hearing on the petitioner's motion to exclude the mtDNA evidence was held on July 22, 1994. Counsel acknowledged that as of the hearing date, he had not received the FBI's mtDNA testing protocol, although he had received the results of the mtDNA tests performed by the FBI crime lab. Those results indicated that after comparing the mtDNA sequences in the petitioner's saliva sample to the hair found in the victim's pharynx and hairs found on a sheet in the victim's bedroom, "[t]he source of the mtDNA sequence obtained from [the petitioner's saliva] cannot be excluded as the source of the mtDNA sequence obtained from" the hairs found on the sheet and in the victim's mouth. Counsel said that the trial court denied the petitioner's motion based largely on its reading of a newspaper article regarding mtDNA testing that appeared in a local newspaper shortly before the hearing. According to counsel, the article's author "apparently called up the guys in the FBI lab and just took what they said verbatim . . . the Judge made the reference on the record that he didn't need to hear any more testimony, or something to that effect, he had read about it in the paper that morning."

Counsel testified that he obtained the FBI's mtDNA testing protocol a day or two after the hearing in which the trial court denied his motion to exclude mtDNA evidence. Dr. Shields reviewed the protocol; in an affidavit dated August 28, 1996, and filed with the trial court during trial, Dr. Shields stated:

> On the basis of discovery, examination of the protocol, and publications listed in that protocol, it is my opinion that [mtDNA] typing as proposed by the Federal Bureau of Investigation, is not yet sufficiently validated to be scientifically reliable. The major problem is that critical pieces of the validation process have yet to be done or have been done with insufficient sample sizes to be statistically reliable.

However, despite Dr. Shields' conclusion, counsel testified that

> with the advice of [Dr.] Shields to some extent . . . we decided not to use him in the trial . . . it was a strategic decision that we made . . . first of all, we thought the proof was going about as well as we could hope for, but more important[ly], we had thought we had made a significant dent in the FBI scientist's credibility, and also that we had this what amounted to, quote, a bird watcher, testifying against a crime lab person.

Dr. Shields sat at the petitioner's table during trial, "and we had the outline of the line of question[ing] that we would go along with these FBI experts . . . ." Counsel noted that although in hindsight he would have preferred to put Dr. Shields on the stand, counsel said that at the time of trial, "we had thought we had made a significant dent in the FBI scientist's credibility" and that "we felt like we had adequately discredited [the FBI experts'] science." Counsel added that he did not put Dr. Shields on the stand "because we were afraid the State would do to him what we felt we had done to the FBI witnesses."

Counsel testified that he also did not put Dr. Shields on the stand because at the time of trial he believed that the expert's testimony would have detracted from the other evidence presented at trial that was favorable to the petitioner:

> [W]e felt all along that the red hair, if you will, was a red herring, because we felt we could adequately explain where the red hair came from. I don't think that there's any question . . . that the red hair that was found on and near the child was [the petitioner's] hair, but I thought we gave a - - our whole theory was we gave the jury a good explanation of how that hair would have gotten on or about the child and that our 20-minute time line would have made it impossible, even though the hair was [the petitioner's], for him to have done the crime.
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> . . . .
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> He was passed out, I think his blood alcohol level some eight hours later was approaching a point two,[1] which if you extrapolate up would have made him a point three five or a four when this homicide was supposed to have taken place, and our theory was, first of all, impossibility to do that kind of damage to that child in the condition he was in, and then, more importantly, to have been in that condition after doing that kind of damage to that child, to have cleaned himself up so that there was no blood, and no other indication, other than the fact the child was dead, that he had been involved in that crime.

Regarding the brown hair found in the victim's rectum and anus, counsel recalled that an FBI expert testified that the hair could not be tested for mtDNA and that it was "logical for [the petitioner] to have had brown hair as an arm hair and that red-haired people do, in fact, sometimes have brown hair, which I thought at the time was false, [and] I think it's false now." Counsel said that he thought that the location of the brown hair was indicative of its being "part of the sexual assault" and was indicative that Crum, rather than the petitioner, committed these offenses. He also said that although he disagreed with the FBI agent's assertions, he did not request that the FBI test the brown hair for DNA because "it would [have] be[en] hard for us to be assertive that [mtDNA testing] was an imprecise and invalid science and then . . . try to use it to prove the source of the brown hair."

Counsel recalled that Dr. Frank King, the Hamilton County medical examiner, and Dr. Blake had testified that "this child was just horrifically injured and that . . . the kind of injuries that she received were so traumatic and invasive and so bloody," which led counsel to believe that it was "obvious" to him "that the child was killed somewhere other than the bedroom or laundry room" given the small amount of blood present in the room. Counsel also believed that the lack of blood on the child's body at the time she was found "indicated to me that she was cleaned up" before she

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[1]The petitioner submitted to a blood alcohol test approximately ten and half hours after the victim was taken to the hospital; these tests showed his blood alcohol content to be 0.04%. Dr. Blake testified that the petitioner "would have had a blood alcohol level of approximately .20 or .21 percent eleven hours earlier." Paul William Ware, 1999 WL 233592, at *5.

was found. Counsel recalled that before trial, he met with Dr. Susan Hayes, the emergency room physician who treated the victim the morning she died, and he acknowledged that Dr. Hayes had told him that it appeared that the child had been cleaned up before being brought to the hospital. At trial, Dr. Hayes testified that the victim's vagina and rectum were torn, and that the child's upper thighs, labia, and rectum were bruised. Paul William Ware, 1999 WL 233592, at *4. She added that "[a]lthough there was not a large amount of blood on the child, there were indicia of internal bleeding." Id. Counsel acknowledged that on cross-examination, he asked Dr. Hayes, "Don't you remember talking to me and me interviewing you and you telling me in your opinion this child had been cleaned up prior to being brought to the hospital?" and that Dr. Hayes "vehemently" denied the conversation. He said that Allen Miller, one of his investigators, was likely at this meeting but he did not recall considering calling Miller as a witness to impeach Dr. Hayes' testimony. He admitted, "It's apparent now that I should have" recorded the conversation with Dr. Hayes and that it "probably would have" been helpful for him to call Miller as a witness. Neither Miller nor Dr. Hayes testified at the evidentiary hearing.

Randy Milsaps, who at the time of trial was an investigator with the public defender's office, testified that his main duty in this case involved locating an expert witness to address the mtDNA testing issue. He said that early in the case, he spoke with members of O.J. Simpson's criminal defense team, who referred him to Dr. Shields. Milsaps said that because the only lab in the United States conducting mtDNA testing at the time of this trial was the FBI crime lab, the petitioner's defense team made no attempt to test the evidence in this case.

Milsaps said that counsel made the decision not to call Dr. Shields as a witness for two reasons. First, "the FBI brought in the head guy from the lab as supposedly a rebuttal [witness] if Dr. Shields had testified." Second, rather than testifying, "Dr. Shields would look over the protocols and all the testing and everything and the testimonies and advise counsel" regarding the cross-examination of the FBI's expert witnesses.

Milsaps recalled that the petitioner's defense team learned about the brown hair in the victim's rectum and anus "within a month [or] month and a half" before trial. According to Milsaps, counsel considered the hair a "smoking gun" for two reasons. First, the hair was brown, and given that the petitioner had red hair and Crum had brown hair, counsel believed the hair tended to implicate Crum rather than the petitioner. Second, given that the hair was located in the child's rectum and anus, the hair seemed to be consistent with having been placed there during a sexual assault. However, Milsaps said that he did not remember any discussion about either having the State test the hair or requesting a continuance so that an independent lab could test it.

In an order filed July 22, 2008, the post-conviction court denied the petition for relief. In the order, the court stated that counsel was neither deficient nor prejudicial in failing to call Dr. Shields as a witness because "[t]here was . . . no reason to belabor the DNA evidence, perhaps lead the [S]tate to call the director of the FBI laboratory as a rebuttal witness, and thereby emphasize the presence of a pubic hair in the victim's pharynx." The court's order stated that counsel's failure to test the brown hair found in the victim's rectum and anus did not constitute ineffective assistance because "there is not clear and convincing evidence that independent mitochondrial or non-mitochondrial DNA analysis was available or appropriate" at the time of trial, and "because of the

uncleanliness of the house and the victim's lack of clothing, it would not have been conclusive proof of [the petitioner's] innocence" had the petitioner been excluded as the source of the brown hair. Finally, regarding counsel's decision not to record his interview with the emergency room physician or impeach the physician's testimony, the court stated that the testimony of Dr. King and Dr. Blake suggested that the victim's injuries would have resulted in bleeding; thus, counsel's failure to impeach Dr. Hayes' testimony did not prejudice the petitioner. The petitioner subsequently filed a timely notice of appeal.

ANALYSIS

The burden in a post-conviction proceeding is on the petitioner to prove his factual allegations by clear and convincing evidence. Tenn. Code Ann. §40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); see Lockart v. Fretwell, 506 U.S. 364, 368-372 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694. The Strickland standard has been applied to the right to counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the Strickland test. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). The performance prong requires a petitioner raising a claim of ineffectiveness to show that the counsel's representation fell below an objective standard of reasonableness or "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. The prejudice prong requires a petitioner to demonstrate that "there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability means a probability sufficient to undermine confidence in the outcome." Id. Failure to satisfy either prong results in the denial of relief. Strickland, 466 U.S. at 697.

We first conclude that counsel's decision not to call Dr. Shields, the petitioner's retained

expert concerning the mtDNA testing protocol, did not constitute ineffective assistance of counsel. Counsel testified that he and Dr. Shields agreed that Dr. Shields would not testify but would instead sit at the petitioner's table during trial and advise counsel regarding his cross-examination of the FBI's expert witnesses. Counsel said that he reasonably believed that he, with Dr. Shields' assistance, "adequately discredited [the] science" behind the FBI's mtDNA testing protocol. Counsel added that he made the strategic decision not to call Dr. Shields because he believed that the red hairs were the petitioner's anyway, given that the petitioner spent time at the victim's house, and counsel did not want the issue concerning the red hair to detract from his ultimate theory of the case: that the petitioner was unable, given his intoxication and the relatively brief time frame in which he was alone with the victim, to commit these offenses and clean the blood from himself, the victim, and the crime scene. In our view, counsel's strategic decision did not constitute deficient performance. Furthermore, given that Dr. Shields did not testify at the evidentiary hearing, it is unclear what his testimony at trial would have been or how his testimony would have contributed to the defense. As such, the petitioner cannot establish that he was prejudiced by counsel's failure to call Dr. Shields as a witness at trial.

Regarding whether counsel was ineffective for failing to test the brown hair found in the victim's rectum and anus, counsel recalled that at trial, the FBI expert on mtDNA testing testified that a body hair was not suitable for mtDNA testing. Counsel said that he did not request to have the hair tested because "it would [have] be[en] hard for us to be assertive that [mtDNA testing] was an imprecise and invalid science and then . . . try to use it to prove the source of the brown hair." Additionally, although counsel testified that he did not believe the FBI expert who testified that red-headed persons may have brown body hair, the petitioner did not present a witness at the evidentiary hearing that would have refuted the FBI agent's testimony. Furthermore, as this court noted on direct appeal, given the "unkempt and unclean" condition of the victim's residence, "it is quite conceivable that hair from a number of visitors to the home was present on the floors of the home," and the brown hair "could have become embedded in the victim's orifice during the course of a brutal rape or even possibly during the transport of her body after the crime." Paul William Ware, 1999 WL 233592, at *12. Accordingly, we conclude that the petitioner has not established that counsel's failure to test the brown hair constituted either deficient or prejudicial performance.

The petitioner's final assertion is that counsel was ineffective for failing to call Allen Miller, an investigator, to testify regarding a conversation between Dr. Hayes, the emergency room physician, and counsel. According to the petitioner, Miller was present at the hearing, and he would have testified that Dr. Hayes said during the interview that the victim should have bled significantly from her wounds and appeared to have been cleaned up when brought to the emergency room. However, neither Miller nor Dr. Hayes testified at the evidentiary hearing, so the petitioner cannot support his assertion regarding the content of Miller's supposed trial testimony. Furthermore, at trial both Dr. King, the medical examiner who testified for the State, and Dr. Blake, the petitioner's medical expert, testified that the victim's injuries should have produced bleeding, and Dr. Blake also testified "that he would have expected to have seen more blood on [the victim], even if she was deceased at the time of the sexual assault." Id. at *7. Thus, because the petitioner was still able to present evidence regarding the amount of blood produced by the victim's injuries, the petitioner was

not prejudiced by counsel's failure to call Miller to impeach Dr. Hayes' testimony. Having concluded that none of the petitioner's assertions regarding counsel's performance constitute ineffective assistance of counsel, we deny the petitioner relief.

CONCLUSION

Upon consideration of the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

D. KELLY THOMAS, JR., JUDGE